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Allocating liability for online infringement in Russia

At present, there is confusion over the rules determining who is liable – and in what circumstances liability occurs – for IP infringement that takes place through resources provided by ISPs

Since the early 1990s the Internet has become incredibly popular; according to Netcraft research, as of October 1 2010 there were more than 232 million active websites. It is impossible to imagine life without the unlimited opportunities that it offers.

However, people use the Internet for many different purposes, some of which may be against the law. For instance, counterfeiters may use the Internet to distribute low-quality replicas of famous-brand watches at attractive prices, constituting trademark infringement. Pirates can easily spread illegal copies of films through different file-sharing websites, constituting copyright infringement, and swindlers may obtain credit card information from unsecure websites and steal money.

Clearly, the Internet must be bound by certain legal limitations in order to make it possible to prevent violations in any given sphere. The governments of many countries adopt special laws regulating the online sphere in order to help the law enforcement authorities to deal with online problems effectively.

However, considering that the Internet is a relatively new phenomenon in Russia, currently no specific laws on the Internet are in force, although relevant bills are now under discussion. Some such bills have been submitted to Parliament, but have failed to pass the vote. Thus, it is hard to know when laws regulating the Internet may be approved by Parliament and signed by the president in order to become effective and enforceable.

Many Russian internet service providers (ISPs) believe that Runet (the name given by Russian users to the part of the Internet written in Russian) does not need specific legislation, and that it would be better to amend the existing laws to include current

practice on the resolution of internet disputes. This opinion is valid, since the Russian legal system includes different legal measures to regulate these and other issues concerning online activity, although the regulation is sometimes far from ideal.

Trademark infringement on the Internet

The development of IT technology has, to some extent, contributed to the distribution of counterfeit products on the world market. Russia is no exception to this trend. Every day, many Russian internet users receive dozens of spam emails inviting them to visit websites and buy goods whose origin is sometimes doubtful.

The emails offer Rolex watches for \$10, Dolce and Gabbana t-shirts for \$15 and even iPhones for \$30 – leading consumers to realise that such famous brand-named goods sold at such low prices must be counterfeit.

In some cases counterfeiters distribute fake goods through well-known and well-reputed trade platforms such as eBay, which was recently involved in a French court case regarding the sale of counterfeit products marked with the trademarks belonging to the LVMH group.

In general, the Russian law, in particular Part IV of the Civil Code, prohibits the sale, offer for sale and marketing of goods bearing another party's trademark that is protected in Russia, as well as the use of that trademark on the Internet. When such activities are carried out without the permission of the trademark owner, they constitute infringement of the trademark rights and entail civil, administrative and criminal responsibility.

Further, the law states that an infringer is a person who illegally uses a trademark with respect to goods for which the trademark has been registered. In this

regard, one of the most important issues to be investigated by the trademark owner before launching an infringement action is the identity of the infringer to whom the claims should be addressed.

Personal data protection

Until recently, it was simple to obtain information about an infringer. For instance, in domain name disputes it was common practice to obtain such information from the domain name registrar by sending a simple request (an uncertified printout from the WHOIS service is insufficient for legal proceedings).

However, in view of Russia signing up to the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981), which determines common principles of personal data protection across Europe, on July 27 2006 the Law on Personal Data (152-FZ) was adopted.

According to Article 2, the new law is designed to protect the rights and liberties of a citizen when processing his or her personal data, including the protection of his or her rights to privacy, private and family secrets. Further, the law provides that personal data shall include any information relating to an individual, including his or her name, family name, date and place of birth, address, marital, social and property status, education, occupation, earnings and other information.

Thus, information about the owner of a domain name falls under the scope of the Law on Personal Data. It is now much more complicated to obtain the requisite information from a domain name registrar with respect to domain names owned by individuals; in most cases registrars, who are recognised as personal data operators, refuse to provide the requested

information, referring to restrictions imposed by the Law on Personal Data.

The law provides that personal data operators shall be entitled to use personal data only with the data subject's consent. Such consent may be expressed in writing (written form is mandatory for processing special kinds of personal data concerning race, political and religious convictions), or another form.

The Law on Personal Data is vital to protect physical persons from unauthorised disclosure of their personal data. In the meantime, it is obvious that the law must be amended, at least in relation to those issues that concern the obtaining of information about the owner of the domain name where an infringement takes place or other persons involved in the infringing activity.

ISP liability

In some cases infringement occurs due to certain persons' intentional activity. However, they would be unable to perform such activity without the technical support of ISPs. In this regard, another question arises regarding whether ISPs should be held liable for online infringements. As mentioned above, there is no special law on the Internet in Russia; therefore, the answer to this question should be given by court practice.

One school of thought holds that an ISP should be liable for all infringements that occur on websites that it manages, even when illegal content is uploaded by users, since it has the necessary technical tools to control and remove illegal content.

On the basis of this assumption, Content and Law filed a lawsuit against ISP Masterhost for the illegal reproduction of sound recordings which were being kept in a computer's memory (the server was located at www.zaycev.net) – and the communication of such recordings to the public.

The case went through the various court instances, including the supervisory instance, to the Supreme *Arbitrazh* Court. In Resolution 10962/08 (December 23 2008), the highest court held that since the server did not belong to the ISP and the ISP merely provided its subscribers with technical support, it was not liable for the transmission of information by third parties through its server.

In addition, the court took into account that the rights holder did not ask the ISP to stop the operation of the subscriber's server in connection with the illegal content uploaded onto it. In addition, the ISP undertook measures to reveal who had uploaded the illegal content, while the rights holder did not file a law suit against that person. Summarising all the



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circumstances, the panel of judges of the Supreme *Arbitrazh* Court concluded that the ISP was not responsible for the use of copyrighted material and hence should not be liable for such infringement.

At the same time, another copyright infringement case was initiated by First Music Publishing against Rambler, a provider of media and internet services. Music videos of Belarus music group Lyapis Trubetskoy were uploaded onto Rambler's website at www.rambler.ru.

The first instance court dismissed the case because the defendant did not directly perform actions that put the music videos into the public domain; this was done by the user of the 'rambler.ru' service. Further, the court mentioned that providing the technical means to upload information cannot be seen as sufficient grounds for holding the provider liable.

However, the Court of Appeals reversed that decision and upheld the claims for the following reasons.

Rambler is the owner of the domain name 'rambler.ru', where it provides the Rambler Vision service. According to the rules of the Rambler Vision service, the service provider has the right to remove or block access to the content uploaded by users if it infringes the rights of a third party.

However, Rambler produced no evidence that the music video was uploaded by a user to whom the claims could have been addressed. Therefore, the court concluded that Rambler used the copyrighted music video by bringing it into the public domain without the rights holder's permission and hence was liable for the infringement.

In the absence of specific regulations, these landmark cases indicate a trend in the practice of the Russian courts. An ISP is liable for infringement if it does not take necessary actions, in particular of a technical nature, to prevent or cease an infringement about which it has been duly informed by the rights holder, or at least prove that the infringing activities were carried out by another person.

Taking into account the high risk of being held liable for the infringement of IP rights, Russian ISPs and owners of internet resources (eg, file-sharing sites) prefer to remove all relevant links and illegal content themselves on receipt of a warning letter from a rights holder. In such circumstances, the warning letter method has become the most effective tool against different types of infringement on the Internet.

The Russian ISP community is seriously concerned about the state of play. As a result, it has prepared a declaration addressed to both rights holders and authorities, stating that Russian law contains no clear rules for determining who is liable – and in what circumstances liability occurs – for IP infringement that takes place through resources provided by ISPs.

Therefore, the ISPs are calling on rights holders to use the existing options (eg, forwarding notifications of infringement to ISPs) to allow ISPs to remove illegal content efficiently. However, it is clear that this issue has become serious enough for the next steps to be taken at legislative level. [WTR](#)